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NO. 88-2027

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

WJW-TV, INC.,

Petitioner,

v.

CITY OF CLEVELAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CITY OF CLEVELAND, ET AL.

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TABLE OF CONTENTS

	Page
Counter Statement of the Question Presented	1
Counter Statement of the Case ..	2
The Facts	3
Reasons for Denying the Writ ...	8
I. The Ohio Supreme Court Having Decided That All Meetings Of The Cleveland Council Must Be Open To The Public, The Issues Raised By Petitioner's Complaint Are Now Moot ...	8
II. The Court of Appeals Correctly Determined That There Was No Case Or Controversy For Adjudication	12
Conclusion	19
Certificate of Service	20

TABLE OF CITATIONS

Cases

	Page
Deakins v. Monaghan, ___ U.S. ___, 108 S. Ct. 523, 529, (1988)	14
Florida Board of Business Regulation v. National Labor Relations Board, 605 F.2d 916 (5th Cir. 1979)	17
Fox v. Lakewood (1988), 39 Ohio St. 3d 19	10
Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986).	16
Perkins v. Benguet Mining Co., 342 U.S. 437, 441 (1952)	11
Powell v. McCormack, 395 U.S. 486 (1969)	14,15
State, ex rel. Plain Dealer Publishing Co. v. Barnes (1988), 38 Ohio St. 3d 165 ...	7,9 10,11,12,13
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974).	14,15

Other Authorities

Constitution, State of Ohio, Article IV, Sections 2 and 3 ...	14

Page

Ohio Revised Code Sections
2721.01 et seq.,
Section 2723.01 14

Ohio Supreme Court Rules,
Rule for the Reporting of
Opinions, Rule 1 11

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BRIEF IN OPPOSITION OF RESPONDENTS CITY OF CLEVELAND, ET AL.

COUNTER STATEMENT OF THE QUESTION PRESENTED

Does a definitive determination of state law, upon the issue of whether a municipal council may close its meetings to the public, moot a district court decision granting declaratory and injunctive relief on constitutional grounds with respect to the same issue and upon identical facts?

COUNTER STATEMENT OF THE CASE

The petition of WJW-TV, Inc., owner of a Cleveland, Ohio, television station, tries to breathe life into a moribund dispute of a uniquely local character which was definitively resolved by state law.

The decision of the Court of Appeals, holding moot a District Court order concerning First Amendment access to meetings of local public officials, does not conflict with a decision of any other federal court of appeals. That determination, far from constituting a departure from the usual course of judicial proceedings, expounds and applies such uniformly accepted principles of adjudication as:

(1) Article III of the Constitution limits federal courts to the

adjudication of live and ongoing controversies (Opinion, Court of Appeals, Petitioner's Appendix, A8, A12); and

(2) federal constitutional issues should not be decided if a dispute can be resolved on the basis of state law claims (Opinion, Court of Appeals, Petitioner's Appendix, A10, A11).

The Facts

A recitation of the facts which gave rise to this case and a description of the course of parallel state litigation demonstrates the tenuous basis of the petition.

On November 18, 1986, Cleveland's City Council, its Mayor and sundry other City officials met privately to discuss, but not to act upon, various public issues. Such private meetings had been held on prior occasions and there was

support in Ohio case law for the claim of a right to meet in private or executive session.

Cleveland's daily paper, The Plain Dealer, immediately challenged the right of the City's officialdom to meet privately, seeking a writ of mandamus from an Ohio court of appeals requiring access to the meeting. The writ was denied and the newspaper promptly appealed of right to the Ohio Supreme Court. The prior owner of petitioner sought and was granted leave to file an amicus brief in the Ohio court and through the petitioner's present counsel filed extensive written argument in the Ohio Supreme Court.

In June, 1987, some seven months after the meeting in controversy, petitioner commenced the proceedings below, seeking declaratory and

injunctive relief with respect to the meeting of November 18, 1986 -- the same meeting at issue in the state court proceeding. The action was premised on First Amendment grounds and also set forth pendent state law claims.

Since the basic facts of the November 18, 1988 meeting were not in dispute, both parties filed dispositive motions in the District Court. In the meantime, the state law case was argued to the Ohio Supreme Court on March 1, 1988.

Although advised that state law litigation has been submitted to the Ohio Supreme Court, the District Court on March 30, 1988, issued its declaration and injunction holding upon First Amendment grounds that the meeting of November 1986 violated the Constitution and issued an injunction

prohibiting meeting closures by the City unless specific legislative findings supporting confidentiality were made. The City promptly appealed and thereafter sought and obtained a stay of the District Court's order.

On August 11, 1988, the Ohio Supreme Court issued a definitive exposition of Ohio law regarding the right of chartered Ohio municipalities to close their meetings to the public. In a decision and order far more restrictive and significantly more specific than the order of the District Court, the Ohio Court held that under Cleveland's Charter all meetings of a majority of the Cleveland Council or its committees must be open to the public and that no private or executive sessions might be conducted in the absence of a Charter provision adopted by the electors of the

City authorizing such sessions. State, ex rel. Plain Dealer Publishing Co. v. Barnes (1988), 38 Ohio St. 3d 165. It is obvious from a reading of the Ohio decision that legislative findings of the sort required by the order of the district court would not support meeting closure under Ohio law. Plainly and simply, all meetings of the Cleveland Council and its committees must be open to the public without exception. From the moment of the announcement of the Ohio Supreme Court decision, the declaration and order of the District Court was practically and legally a nullity.

The City did not petition the Ohio Supreme Court for rehearing or reconsideration, the City has at all times since the announcement of the Plain Dealer decision conformed with the

strictures of that decision and there is no movement afoot to amend the City Charter to permit private meetings of the Council. The issue is simply dead.

REASONS FOR DENYING THE WRIT

I. The Ohio Supreme Court Having Decided That All Meetings Of The Cleveland Council Must Be Open To The Public, The Issues Raised By Petitioner's Complaint Are Now Moot.

There can be little doubt that the basic substantive issue of whether meetings of the Cleveland City Council are open to the public and press was conclusively adjudicated at state law. The drift of petitioner's lament is that it no longer has a court order of its own. The Ohio Supreme Court, however, made it abundantly clear that Cleveland's Council must keep all of its meetings open to the public, a decision which redounds to the benefit of petitioner.

The Ohio Court, in a definitive declaration, held:

> As used in Section 28 of the Charter of the City of Cleveland, a "meeting" of the Cleveland City Council or any of its committees means any assemblage of the city council or its committees where a majority of members constituting the body are in attendance and the gathering is arranged for the purpose of discussing public business. Plain Dealer, supra, syllabus 3.[1] (Emphasis by the Court)

That Court in the text of its opinion went on to point out (Plain Dealer, supra, at pp. 167, 168):

> ... the Charter requires all meetings of council and its committees to be public and does so without exception.... We reject the proposition that council has implied authority to designate and hold special meetings of council or committees thereof in contravention of the more specific duty mandated by Section 28. (Emphasis by the Court)

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1 In Ohio, the syllabus of a Supreme Court decision constitutes the law of the case. See authorities cited infra, p. 11.

Lest there by any doubt, the State Supreme Court specifically overruled two Ohio intermediate court decisions which sanctioned private or executive sessions of municipal councils. Plain Dealer, supra, at p. 168 (footnote 2).

And should there yet remain a residual concern regarding the purport of its decision in Plain Dealer, the Ohio Supreme Court two months later reaffirmed that holding in Fox v. Lakewood (1988), 39 Ohio St. 3d 19, 21:

> We also concluded in State, ex rel. Plain Dealer Publishing Co., supra, that the plain and ordinary meaning of such charter language restricts a municipal legislative authority from exercising whatever implied power it may have to engage in the practice of closed or executive sessions.

In sum, Plain Dealer, leaves nothing to the imagination or indeed creativity of respondent municipality.

First, the order is quite specific.

The Ohio court, unlike the district court, defined the term meeting ("any assemblage of the city council or its committees" attended by a majority ...)

Second, the state court order is all embracing ("all meetings of council and its committees must be public ..."). The Ohio ruling is more restrictive than the order of the district court which undertook to permit closed meetings upon legislative findings of confidentiality.

Finally, Plain Dealer is the ruling case law in Ohio. In Ohio, the syllabus of a Supreme Court decision constitutes the binding law of the case to be read in conjunction with the decided facts of the specific case. Perkins v. Benguet Mining Co., 342 U.S. 437, 441, footnote 3 (1952), Ohio Supreme Court Rules, Rule for the Reporting of Opinions, Rule 1. The syllabus of Plain Dealer, recited

above, read in conjunction with Cleveland Charter requirement that "[a]ll meetings of the Council or committees thereof shall be public..." constitutes about as succinct and specific a legal requirement as one might find.

Prolongation of a dispute over a meeting held nearly three years ago, or the mooted question of whether Cleveland's Council meetings must be open is, at best, pointless and will only muddy juristic waters cleared by the Ohio Supreme Court.

II. The Court Of Appeals Correctly Determined That There Was No Case Or Controversy For Adjudication.

Notwithstanding the specificity, breadth and finality of the Plain Dealer decision, petitioner argues that the issue of open council meetings remains vital because the forms of action of the

state and federal proceedings were different and the writ of mandamus issued in Plain Dealer did not order prospective relief. The argument honors form over substance.

The ruling in Plain Dealer establishes the standard of conduct to be followed in Cleveland as well as other Ohio municipalities having comparable charter provisions. Conformity with that standard is not "voluntary cessation" of wrongful conduct, but a duty now imposed by law upon Cleveland's officials. There has been no breach of that duty and none can be reasonably anticipated.[2] Should

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2 Petitioner cites the Court to a newspaper article reporting that Cleveland's Council President was considering holding split meeting of the Cleveland Council to avoid the requirements of Plain Dealer (Petition p. 12, footnote 3). Assuming the article correct, Mr. Forbes apparently thought better of the idea since no such meetings were held.

the duty at some time be breached, there are abundant remedies at state law, including the writ of mandamus available at each of the three tiers of Ohio judicial system and declaratory and anciliary relief under the Ohio variant of the Uniform Declaratory Judgment Act, Constitution, State of Ohio, Article IV, Sections 2 and 3; Ohio Revised Code Section 2723.01, Sections 2721.01 et seq.

Nor would petitioner be precluded from pursuing a federal remedy on a fresh rather than stale state of fact. As this Court recently reiterated "... vacation and dismissal of the complaint that has become moot 'clears the path for future relitigation of the issues between the parties' should subsequent events rekindle their controversy." Deakins v. Monaghan, ___ U.S. ___, 108 S. Ct. 523, 529, footnote 5 (1988).

Neither Powell v. McCormack, 395 U.S. 486 (1969) nor Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), relied upon by petitioner provides a basis for bringing this case back to life. In Powell, a claim for the unconstitutional deprivation of the salary of Representative Adam Clayton Powell during the 90th Congress was a live and justiciable issue which precluded dismissal for mootness even though Representative Powell was subsequently seated by the 91st Congress.

Similarly, in Super Tire there remained an ongoing dispute concerning a New Jersey statute providing welfare benefits to striking employees. The Super Tire court concluded that it is sufficient to avoid mootness to show "the existence of an immediate and definite governmental action or policy

that has adversely affected and continues to affect a present interest (416 U.S. at 125, 126). In the case at bar, the practice complained of was terminated by writ of the Ohio Supreme Court.

Neither case turned as petitioner suggests, on the existence of a request for multiple forms of relief, but rather upon the continuing vitality of the controversy.

Nor is petitioner accurate in characterizing various cited decisions from the Second, Fifth, Seventh and Ninth Circuits as applying a "multiple relief standard" (Petition, p. 16). Each cited case was found by the deciding court to involve a governmental policy or practice which either continued or bore a reasonable expectation of repetition.

For example, in Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), a United States attorney's investigation into possible voting fraud by naturalized voters, although terminated, was found to present justiciable issues under the "capable of repetition yet evading review" doctrine. In a similar vein, in Florida Board of Business Regulation v. National Labor Relators Board, 605 F.2d 916 (5th Cir. 1979) the challenged governmental practice (an NLRB assertion of jurisdiction) continued although the event which raised the issue had concluded. Each cited circuit court decision is altogether reconcilable with the holding of the Sixth Circuit at issue here.

Here there is simply no ongoing dispute having the vitality essential to

adjudication, but rather the desire of a party and its counsel to pursue an advisory opinion on an issue of constitutional dimension.

It may well be that this Court will at some time choose to adjudicate the issue of whether the First Amendment provides a right of public access to meetings of local legislators. This case is hardly the vehicle for such an adjudication, the Ohio Supreme Court having conclusively decided that in Cleveland, the public and its delegates of the press have that right because of the wording of a municipal charter adopted by the electors of the City.

CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

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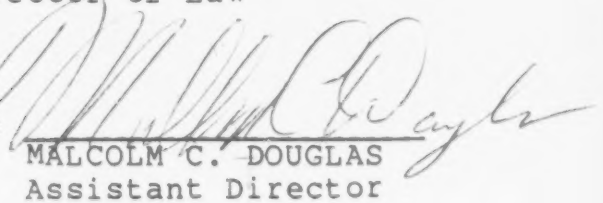
By: 
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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition of Respondents City of Cleveland, et al. were mailed this 10th day of July, 1989 to

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